

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

FILED/ACCEPTED

NOV 10 2008

Federal Communications Commission
Office of the Secretary

In the Matters of)	
)	MB Docket No. 08-214
Herring Broadcasting, Inc. d/b/a WealthTV,)	
Complainant)	
v.)	File No. CSR-7907-P
Comcast Corporation,)	
Defendant)	
)	
NFL Enterprises LLC,)	
Complainant)	
v.)	File No. CSR-7876-P
Comcast Cable Communications, LLC,)	
Defendant)	
)	
TCR Sports Broadcasting Holding, L.L.P.,)	
d/b/a Mid-Atlantic Sports Network,)	
Complainant)	
v.)	File No. CSR-8001-P
Comcast Corporation,)	
Defendant)	

To: The Commission

PROTECTIVE APPLICATION FOR REVIEW

Comcast Corporation and Comcast Cable Communications, LLC (collectively "Comcast"), by their attorneys and pursuant to 47 U.S.C. § 155 and 47 C.F.R. § 1.115,¹ hereby request limited review of the Hearing Designation Order regarding the above-captioned complaints² with respect to its failure to provide explicitly for the filing of exceptions to the Recommended Decision of the Administrative Law Judge ("ALJ"). Comcast makes this filing to

¹ The Commission is required to rule itself on this application for review. 47 U.S.C. § 155(c)(1), (4).

² *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, MB Docket 08-214, *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (MB rel. Oct. 10, 2008), as amended by *Erratum* (MB rel. Oct. 15, 2008) (collectively "HDO").

No. of Copies rec'd 0+14
List ABCDE

protect its fundamental right to file such exceptions in the event that the ALJ rules against it in any respect in any of the above-captioned complaints. The opportunity to file exceptions to the Recommended Decision is required by the Communications Act of 1934, as amended (the "Communications Act"), the Administrative Procedure Act ("APA"), and the Due Process Clause of the U.S. Constitution. To avoid any uncertainty at the conclusion of the hearing, the Commission should explicitly clarify now that the parties are entitled to file exceptions to the ALJ's Recommended Decision.

The *HDO* does not explicitly provide for exceptions: "Upon receipt of the Administrative Law Judge's recommended decision and remedy, the Commission will make the requisite legal determinations ... [and] decide upon appropriate remedies."³ As a matter of law, however, any of the parties to the disputes subject to the *HDO* have the right to challenge an adverse recommended decision. Section 409(b) of the Communications Act specifically provides:

In every case of adjudication (as defined in section 551 of title 5) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the ... recommended decision, which shall be passed upon by the Commission⁴

³ *HDO* ¶ 121. While we believe the Commission never contemplated eliminating the opportunity to file exceptions to an ALJ's decision, there is some imprecision in the rules with respect to the nomenclature pertaining to "initial" and "recommended" decisions in the context of exceptions. 47 C.F.R. §§ 1.276-1.277. *See also* 47 C.F.R. § 76.10(c)(2) (cross-referencing Sections 1.276 and 1.277).

⁴ 47 U.S.C. § 409(b). An "adjudication" is defined by the APA as an "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order" is defined as "the whole or a part of a final disposition ... of an agency in a matter other than rule making...." *Id.* § 551(6). Because the Commission's final decision in this proceeding will be an order, the proceeding is an adjudication, and Section 409(b) governs.

The right under Section 409 to file exceptions *before* a final decision is distinct from the right to seek reconsideration of a decision that has already been reached, pursuant to 47 U.S.C. § 405. The opportunity to seek reconsideration is no substitute for being heard before a decision. *See National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) ("People

(footnote continued)

Likewise, the APA guarantees that parties are entitled to a “reasonable opportunity” to file “exceptions to ... recommended decisions” and “supporting reasons for the exceptions.”⁵ Moreover, due process requires that Comcast and other parties have an opportunity to be heard on whether an adverse recommended decision should be made final.⁶ Complainants also recognize the requirement for an opportunity to file exceptions in this case.⁷

The Commission has previously recognized the need for a hearing designation order to provide for the filing of exceptions to recommended decisions of ALJs. In the *MobileMedia* proceeding, for example, the Commission included an ordering clause in its hearing designation order expressly providing a 30-day period after the recommended decision for filing exceptions.⁸ The Commission should thus correct the Bureau’s oversight in the *HDO* and similarly provide

(footnote continued)

naturally tend to be more close-minded and defensive once they have made a ‘final’ determination.”).

⁵ 5 U.S.C. § 557(c)(2), (3).

⁶ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotation marks and citation omitted).

⁷ TCR Sports Broadcasting Holding, L.L.P. (“TCR”), Opposition to Comcast Corporation’s Request for Certification to the Commission, at 8 (Oct. 27, 2008) (“The Communications Act likewise requires that a party have an opportunity to ‘file exceptions and memoranda in support thereof to the ... recommended decision.’”) (quoting 47 U.S.C. § 409(b)). See also *id.* at 2; Herring Broadcasting, Inc. d/b/a WealthTV, Opposition to Comcast’s Request for Certification to the Commission, at 1-2 (Oct. 27, 2008) (adopting the “arguments, reasoning and authorities” cited in TCR’s October 27, 2008 opposition).

⁸ *MobileMedia Corp.*, WT Docket 97-115, *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture*, 12 FCC Rcd 14896, 14904 (1997) (“[W]ithin 30 days of certification of the evidentiary record and the filing of [the] presiding Administrative Law Judge’s recommended decision, the parties may file with the Commission exceptions to the recommended decision along with the parties’ proposed conclusions, briefs, or memoranda of law.”) In *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, MB Docket 06-148, *Memorandum Opinion and Hearing Designation Order*, 21 FCC Rcd 8989 (2006), the Commission’s hearing designation order did not provide for the filing of exceptions to the recommended decision, but because the case settled, the legality of not doing so never had to be resolved.

for the filing of exceptions in this case, as required by the Communications Act, the APA, and the Due Process Clause of the U.S. Constitution.

Finally, to the extent necessary, pursuant to 47 C.F.R. § 1.3, Comcast requests waiver for good cause of Commission rules requiring it to defer the filing of this application for review until the time for filing exceptions to an initial decision.⁹ Those rules should not be allowed to stand in the way of clarifying the fundamental right to file exceptions. Given the uncertainty regarding whether exceptions may be filed, it makes no sense to defer consideration of that issue until exceptions are filed – an event that may never occur without the clarification requested here. Such an outcome would undercut the purpose of the Commission’s application for review rules and, as explained above, would violate the Communications Act, the APA, and the Due Process Clause.

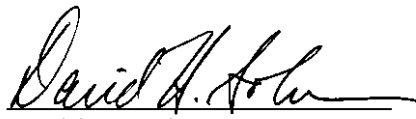
Accordingly, the Commission should promptly grant this application for review and provide for the filing of exceptions to the ALJ’s Recommended Decision. If the Commission has

⁹ See 47 C.F.R. § 1.115(e)(3) (in the absence of certification by an ALJ, applications for review of hearing designation orders issued under delegated authority shall be deferred until exceptions to an initial decision are filed); *see also id.* § 76.10(c)(1) (cross referencing Section 1.115). We note that Comcast previously filed Requests for Certification with the ALJ on separate issues under the Section 1.115(e)(3) standard. This application for review relates to post-hearing challenges, not the hearing itself, and thus does not fall within the scope of Section 1.115(e)(3). Accordingly, Comcast did not present this issue to the ALJ in its Requests for Certification. We also note that, with one exception not applicable here, petitions for reconsideration of the *HDO* are not permitted. See 47 C.F.R. § 1.106(a)(1).

not so ruled at the time when the ALJ issues his Recommended Decision, Comcast reserves the right to lodge exceptions pursuant to Section 409(b) of the Communications Act.

Respectfully submitted,

COMCAST CORPORATION
COMCAST CABLE COMMUNICATIONS, LLC

By: 
David H. Solomon
L. Andrew Tollin

WILKINSON BARKER KNAUER, LLP
2300 N Street, NW, Suite 700
Washington, D.C. 20037
(202) 783-4141

James L. Casserly
Michael H. Hammer
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, D.C. 20006-1238
(202) 303-1000

Michael P. Carroll
David B. Toscano
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4547

Its Attorneys

November 10, 2008

CERTIFICATE OF SERVICE

I, Marc D. Knox, hereby certify that, on November 10, 2008, copies of the attached Protective Application for Review were served by First Class Mail and email to the following:

Jonathan D. Blake
Gregg H. Levy
James M. Garland
Sarah L. Wilson
Robert M. Sherman
Leah E. Pogoriler
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Kathleen Wallman
Kathleen Wallman, PLLC
9332 Ramey Lane
Great Falls, VA 22066

David C. Frederick
Evan T. Leo
Kelly P. Dunbar
David F. Engstrom
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036

Geoffrey M. Klineberg
Priya R. Aiyar
Derek T. Ho
Kellogg, Huber, Hansen, Todd, Evans & Figel,
P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036

Kris Anne Monteith
Gary P. Schonmann
Elizabeth Mumaw
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Arthur I. Steinberg*
Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Matthew Berry*
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554



Marc D. Knox

* Courtesy Copy